IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

STATE OF TENNESSEE ex rel. ROBERT E. COOPER, JR., ATTORNEY GENERAL AND REPORTER,	)	
Plaintiff,	)	
v.	)	**No. 08-2785**
BLUEHIPPO FUNDING, LLC, BLUEHIPPO CAPITAL, LLC, VIRGINIA, BLUEHIPPO CAPITAL, LLC, NEVADA d/b/a BLUEHIPPO DIGITAL BOULEVARD, www.bluehippo.com, www.bigbluead.com, and www.approvalpc.com,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND

Plaintiff, State of Tennessee, ex rel. Robert E. Cooper, Jr., Attorney General and Reporter, sues Defendants BlueHippo Funding, LLC, BlueHippo Capital, LLC, Nevada, and BlueHippo Capital, LLC, Virginia (collectively "BlueHippo") for violating the Tennessee Consumer Protection Act of 1977 ("TCPA"), Tenn. Code, Ann. §§ 20-13-101, et seq.

On November 13, 2008, Defendants removed this action to federal court under 28 U.S.C. § 1441(a). Plaintiff moved the Court to remand the action on November 24, 2008. Defendants contend that the Court has original jurisdiction over the action under 28 U.S.C. § 1332(a) because the parties are completely diverse and the amount in controversy exceeds $75,000. For the foregoing reasons, Plaintiff's motion is GRANTED.

I. BACKGROUND

Defendants provide financing to consumers to buy computers and other products, but are not licensed lenders in Maryland, Tennessee, or any other state. (Compl. ¶ 6.) As of September 2008, Defendants have accepted $2,629,870.91 from 4,542 consumers with Tennessee billing addresses. (Compl. ¶ 13.)

The State of Tennessee alleges that the "the Defendants have engaged in unlawful commercial practices in the way they advertise, promote, offer, and bill their 'layaway' and financing plan to consumers who have had past credit problems, who are indigent, and/or those who have fixed or limited incomes for computers and other products that the Defendants do not possess, own, or ship." (Compl. ¶ 7.) "The State generally alleges that the Defendants have deceived consumers as to the fundamental nature of their default 'layaway' payment program." (Id. at ¶ 8.)

The State further alleges that the Defendants have "fraudulently misrepresented that consumers were required to agree to their financing program and failed to clearly and conspicuously disclose the material terms associated with their financing program." (Id. at ¶ 9.) According to the State, "Defendants have also deceived consumers as to material terms of their two offers, the layaway program and the financing program, by selectively highlighting the more attractive term of one offer without identifying the offer to which the term applies or without clearly and conspicuously disclosing the less attractive term contained in the other offer.” (Id. at ¶ 10.) “The Defendants’ advertisements have failed to clearly and conspicuously disclose basic information [about] the Defendants’ offer including the specific product model, the total cost of the product, the date that the computer will be delivered, or the non-refundability of payments.” (Id. at ¶ 11.)

The State seeks the following remedies:

- A declaration that Defendants have violated the TCPA;
- A temporary and permanent injunction to restrain Defendants from engaging in acts and practices that violate the TCPA;
- An order requiring the Defendants to place $2,126,169.65, the total of all sums received from Tennesseans, in a registry account with the Clerk and Masters office;
- A judgment awarding the State costs and fees;
- A declaration that the acceptance of Defendants’ offer is not valid and binding on any consumers with billing addresses in Tennessee, because Defendants have not made the proper disclosures in their initial offers;

- Any such other orders or judgments necessary to restore any person who has suffered any ascertainable loss; and
- An order requiring Defendants to pay civil penalties for violating the TCPA.

(Compl. Prayer for Relief ¶¶ 3-10.)

II. STANDARD OF REVIEW

On a motion for remand, the defendant bears the burden of establishing that removal was proper. Long v. Bando Mfg. of America, Inc., 201 F.3d 754, 757 (6th Cir. 2000). Removal under 28 U.S.C. §§ 1441 and 1446 is appropriate when federal jurisdiction existed at the time of removal, without consideration of subsequent events. Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 375 (6th Cir. 2007). "The removal petition is to be strictly construed with all doubts resolved against removal." Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 339 (6th Cir. 1989) (citing Wilson v. USDA, 584 F.2d 137, 142 (6th Cir. 1978)).

III. ANALYSIS

Removal jurisdiction requires a showing that the federal court has original jurisdiction over the action, either through: (1) diversity of citizenship under 28 U.S.C. § 1332; or (2) federal question jurisdiction under 28 U.S.C. §§ 1331 and 1441. Defendants premised removal on diversity of citizenship. 28

U.S.C. § 1332(a). For this Court to exercise diversity jurisdiction “no plaintiff may be a citizen of the same state as any defendant,” Probus v. Charter Commc’ns, LLC, 234 F.Appx. 404, 407 (6th Cir. 2007), and the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a). Plaintiff argues for remand because the State of Tennessee is not a citizen for diversity purposes and, therefore, defeats diversity jurisdiction. Plaintiff also contends that, if the individual citizens of Tennessee are the real parties in interest, the amount in controversy is not satisfied.

A. Citizenship of the Real Party in Interest

The State of Tennessee is not a citizen for diversity purposes. See Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents, 737 F.2d 540, 543 (6th Cir. 1984) (“The principle is well settled that a state may not be considered a citizen to establish diversity jurisdiction.”) (quoting Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894)). In determining whether diversity jurisdiction exists, courts must look beyond the named parties and consider the citizenship of the real parties in interest. Navarro Savings Ass’n. v. Lee, 446 U.S. 458, 461 (1980). Defendants argue that the “State of Tennessee is a nominal plaintiff only and should be disregarded for purposes of ascertaining whether federal jurisdiction based on diversity exists.” (Not. of Removal ¶ 14.) Defendants contend that the citizens of Tennessee, on whose behalf the State of Tennessee seeks restitution, are the real parties in interest. (Id.)

Defendants rely on Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 311 (Tenn. 2008), for the proposition that the Attorney General's power to bring an action under the TCPA "on behalf of consumers is akin to a class action." (Not. of Removal at 4.) From this premise, Defendants conclude that "[t]his case, in substance, is a class action brought on behalf of an identifiable class of 4,542 Tennessee consumers and seeks redress on their behalf." In Walker, the Tennessee Supreme Court found that public policy did not favor allowing class actions under the TCPA, because the "Attorney General's power to bring actions on behalf of consumers is akin to a class action." Walker, 249 S.W.3d at 311. The court went on to say that the remedies available under the TCPA are "not limited to injunctive relief, but rather the court may award restitution on behalf [of] those consumers who have suffered an ascertainable loss." Id. The court was not suggesting that all actions by the Attorney General under the TCPA are like class actions, but that the Attorney General's power to seek restitution in addition to other remedies that benefit Tennessee consumers in general could be compared to a class action.

Defendants argue that Louisiana ex rel. Caldwell v. Allstate Ins. Co., 536 F.3d 428, 430 (5th Cir. 2008) supports their position that a state "is not acting on its own direct interest and therefore is not the real-party-in-interest," when it "undertakes to sue for the benefit of a limited number of its citizens." (Not. of Removal at 4.) Allstate Ins. Co., according to Defendants' interpretation, also holds that the "presence of [a] request for injunctive relief [is] insufficient to undercut [the] conclusion that [the] state is not the real party in interest." (Not. of Removal at 4-5.) The Allstate Ins. Co. court held, not that the State of Louisiana was not a real party in interest, but that the individual policyholders were also real parties in interest and that the action was properly removed to federal court under the Class Action Fairness Act. 536 F.3d at 430. The Fifth Circuit found that the injunctive relief sought by Louisiana's attorney general "is clearly on behalf of the State" and "was the type of remedy that state attorneys general's have pursued through parens patriae actions. . ." Id. Nothing in Allstate Ins. Co. suggests that the State of Tennessee is not a real party in interest in the present litigation.

In Com. ex rel Sumbo v. Marathon Petroleum Co., LLC, the court, viewing the complaint as a whole, held that Kentucky was the real party in interest in an action seeking declaratory relief, injunctive relief, civil penalties, and restitution under the Kentucky Consumer Protection Act and Anti-Price Gouging Act. No. 3:07-CV-00030-KKC, 2007 WL 2900461, at *5 (E.D. Ky. Oct. 3, 2007). The court found that the "declaration, injunction, and civil penalties will benefit all Kentucky consumers not just a particular set of consumers." Id. "While the Attorney General does also seek restitution on behalf of particular consumers, this is only one aspect of the wide-ranging relief sought, the substantial portion of which will benefit all Kentucky consumers." Id. The court concluded that the state was the real party in interest in the matter.

Similarly, in State of New York v. General Motors Corp., 547 F. Supp. 703, 705 (S.D.N.Y. 1982), the court held that the "State's goal of securing an honest marketplace in which to transact business is a quasi-sovereign interest." The "State's decision to seek restitutionary relief and damages on behalf of those who have been defrauded by GM" was not sufficient to warrant characterizing the state as a nominal party without a real interest in the outcome of this lawsuit. Id. at 706.

This case is materially indistinguishable from Marathon Petroleum Co., LLC and General Motors Corp. Tennessee seeks a declaratory judgment, an injunction, and civil penalties, remedies that are intended to benefit the citizens of Tennessee as a whole. That the Attorney General also seeks restitution on behalf of certain consumers does not mean that the State's interest is nominal and should be disregarded for purposes of jurisdiction. The cases Defendants cite do not suggest a contrary conclusion. The State of Tennessee is not merely a nominal party. Because Tennessee is a real party in interest and is not a citizen for diversity purposes, this Court does not have diversity jurisdiction.

B. Amount in Controversy

Plaintiff argues in the alternative that, if Tennessee were not a real party in interest, the amount in controversy requirement would not be met. (Pl. Remand Mem. 14.) Defendants assert that "[t]he matter in controversy in this action, exclusive of interest and costs, exceeds the jurisdictional minimum of $75,000." (Not. of Removal ¶ 17.)

Under Defendants' theory, the 4,542 Tennessee consumers are the real parties in interest for at least some of the claims asserted by the State of Tennessee. (Id.) No individual consumer sustained a loss that approaches $75,000. (Pl. Remand Mem. at 16.)[1] "While a single plaintiff can aggregate the value of her claims against a defendant to meet the amount-in-controversy requirement, even when those claims share nothing in

[1] "The computers and other products the Defendants sell typically sell for between $1,500 and $2,000. The maximum the state could obtain for restitution is based on the total amount paid to the Defendants for each consumer plus statutory interest." (Pl. Mem. at 4.) The State seeks $2,571,602 in restitution for 4,542 consumers. This amounts to $566 per consumer.

common besides the identity of the parties, the same is not true with respect to multiple plaintiffs." Everett v. Verizon Wireless, Inc., 460 F.3d 818, 822 (6th Cir. 2006) (internal citations omitted).

A common interest in litigation recovery is an insufficient ground for aggregation. Id. at 824. "Plaintiffs suing to enforce a 'single title or right' must share their 'common and undivided' interest in vindicating that right before the litigation." Id. at 825. In Everett, the Sixth Circuit held that, although each individual's claim arose from a similarly worded contract, the claims were legally distinct rights and were not susceptible of aggregation. Id. Similarly, the claims of individual Tennessee consumers in this case cannot be aggregated to establish the minimum amount in controversy because the consumers do not share an interest in a single title or right. Accepting Defendants' premise that the individual Tennessee consumers are the real parties in interest, the minimum amount in controversy would not be met.

C. Attorneys' Fees

Plaintiff seeks attorneys' fees in the amount of $1,650. (Mot. to Remand at 3.) A court may award attorneys' fees under 28 U.S.C. § 1447(c) only "where the removing party lacked an objectively reasonable basis for seeking removal." Chase Manhattan Mortg. Corp. v. Smith, 507 F.3d 910 (6th Cir. 2007) (quoting Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005)). Defendants have made plausible arguments in good faith. The failure of the Court to accept those arguments does not render them objectively unreasonable. Plaintiff is not entitled to attorney's fees.

IV. CONCLUSION

For the foregoing reasons, the State's motion to remand this case to the Chancery Court for Shelby County, Tennessee, Thirtieth Judicial District at Memphis is GRANTED. The State's request for attorneys' fees is DENIED.

So ordered this 10th day of December, 2008.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE